

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

FIRST TRANSIT, INC.

Employer

and

Case No. 31-RC-8504

TEAMSTERS, LOCAL 87, AFL-CIO,
GENERAL TEAMSTERS AND
FOOD PROCESSING¹

Petitioner

DECISION AND DIRECTION OF ELECTION

Teamsters, Local 87, AFL-CIO, General Teamsters and Food Processing (Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act, as amended (the Act), seeking to represent a unit of dispatchers² of First Transit, Inc. (Employer) at its three facilities, which are located in Bakersfield, Lake Isabella and Mojave, California.

¹ The name of the Petitioner appears as amended at the hearing.

² The Employer classifies dispatchers as dispatcher/supervisor; however, because the issue in this case is whether the dispatchers are supervisors, for clarity herein I will refer to them simply as dispatchers.

The sole issue is whether the dispatchers are Section 2(11) supervisors. The Employer contends that the dispatchers are Section 2(11) supervisors and therefore do not constitute an appropriate bargaining unit; the Petitioner disagrees.³

For the reasons set forth below, I conclude that the dispatchers are not Section 2(11) supervisors and therefore do constitute an appropriate unit.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Upon the entire record in this proceeding, I find:

I. HEARING OFFICER RULINGS: The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

II. JURISDICTION: The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.⁴

III. LABOR ORGANIZATION: The Union is a labor organization within the meaning of Section 2(5) of the Act.

IV. QUESTION CONCERNING COMMERCE: A question affecting commerce exists concerning the representation of certain employees of

³ Neither the Employer nor Petitioner orally argued their positions at the hearing. Each filed post-hearing briefs, which were accepted and duly considered to the extent that they were based on the hearing record.

⁴ The Employer, First Transit, Inc., a Delaware corporation with places of business in Bakersfield California, Lake Isabella California, and Mojave California, provides bus transportation services. During the past 12 months, a representative period, the Employer has provided services valued in excess of \$50,000 to points located outside of the State of California. During this same period, the Employer has derived gross revenues in excess of \$250,000 from the operation of its bus transportation services. The Employer, thus, satisfies the Board's statutory and discretionary standards for asserting jurisdiction. *Charleston Transit Co.*, 123 NLRB 1296 (1959).

the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

V. **APPROPRIATE UNIT:** The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: ⁵

INCLUDED: All full-time and regular part-time dispatchers employed by the Employer at its facilities located at 5348 Victor Street, Bakersfield California, 6616 Lake Isabella Boulevard, Lake Isabella California, and 2200 Nadeau Street, Mojave California.

EXCLUDED: All other employees, managers, guards, and supervisors as defined in the Act, as amended.

In analyzing the issue in this case I will provide an overview of the Employer's operations, then specifically discuss supervisory indicia with respect to the dispatchers.

A. **OVERVIEW OF THE EMPLOYER'S OPERATIONS**

The Employer contracts with Kern County to provide fixed route and dial-a-ride busing services in areas surrounding its three California facilities: Bakersfield, Lake Isabella, and Mojave. Each facility maintains a dispatch office and several buses. Currently, there are eight dispatchers: four work in the Bakersfield facility; three in Lake Isabella; and one in of Mojave.⁶ There are approximately 46 drivers

⁵ The unit description is consistent with the stipulation of the parties.

⁶ Ten dispatchers is considered a full complement for the three locations. Prior to April 2005, three dispatchers worked out of Mojave; however, since April 2005, two of those dispatchers quit and had not been replaced as of the hearing date.

at the three facilities.⁷ The Petitioner is the Section 9(a) representative of all drivers.⁸ A collective bargaining agreement covering the unit of drivers has effective dates of September 12, 2003 through September 11, 2006. No collective bargaining agreement covers the dispatchers.

The Bakersfield dispatch office operates seven days a week: Monday through Friday from 3:30 a.m. until 10:30 p.m., Saturday from 3:30 a.m. until 8:30 p.m., and Sunday from 6:00 a.m. until 9:00 p.m. The Lake Isabella office operates six days a week, Monday through Saturday, from 4:00 a.m. until 8:00 p.m. The Mojave office operates six days a week: Monday through Friday from 4:00 a.m. until 9:00 p.m., and Saturday from 4:00 a.m. until 6:00 p.m.

The Employer employs four managers, including a General Manager, an Operations Manager, a Safety Manager, and a Dispatch Manager;⁹ each has an office in the Bakersfield dispatch office building. Generally, Monday through Friday, at least one of the four managers is physically present in the Bakersfield office from about 7:00 a.m. until between 6:00 p.m. and closing at 10:30 p.m.¹⁰ During the hours in which no manager is present in Bakersfield, one of the four managers is “on-call,” which means s/he is available by phone and/or pager for the

⁷ 56 drivers is considered a full complement for the three locations. The record is silent concerning which locations have driver positions to be filled and silent concerning the numbers of drivers who are full-time and part-time.

⁸ Approximately 26 or 27 drivers work out of Bakersfield; eleven drivers work out of Lake Isabella; and nine or ten drivers work out of Mojave.

⁹ There is no dispute concerning the Section 2(11) status of these four managers, and the record establishes that each exercises independent judgment on behalf of the Employer concerning one or more of the Section 2(11) indicia. I therefore find each of these four managers is a Section 2(11) supervisor.

¹⁰ The Employer asserts that there is a manager at Bakersfield, Monday through Friday 7:00 a.m. until 6:00 p.m. The record establishes that frequently, during weekdays, a manager is present at the Bakersfield office after 6:00 p.m. until closing.

dispatchers. None of the four managers maintains an office in either Lake Isabella or Mojave. From time to time, one or more of the four managers will visit the Lake Isabella or Mojave offices, and once a month the Safety Manager, usually accompanied by the General Manager, will spend an entire day at each of those offices.

Dispatchers report directly to the Dispatch Manager and are the “highest-ranking” persons on the job below the Dispatcher Manager. Generally, dispatchers are in direct daily contact with drivers, deal with customers, document and report daily activities and serve as intermediaries between the Dispatch Manager and drivers.

B. SUPERVISORY INDICIA OF DISPATCHERS

The Employer contends that its dispatchers¹¹ are supervisors within the meaning of Section 2(11) of the Act, which defines “supervisor” as:

“...any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

The criteria listed in Section 2(11) are in the disjunctive so that the exercise of any one may warrant a finding of supervisory status. Further, Section 2(11) contains the conjunctive requirement that any indicium must be exercised with “independent judgment,” rather than in a ‘routine’ or ‘clerical’ fashion, and the person must exercise the authority in the interest of the Employer. *NLRB v. Ken-*

¹¹ The Employer asserts that even though its dispatchers have different experiences and duties, all are vested with the same authority. Therefore, herein, I consider the classification of the dispatcher, rather than differences between the individuals, in terms of Section 2(11) indicia.

tucky River Community Care, Inc., 532 US 706, 712-13 (2001); *Chevron U.S.A.*, 309 NLRB 59, 61 (1992).

Here, there is neither evidence nor argument that dispatchers have authority to transfer, lay off, recall, promote, and/or reward employees or to effectively recommend these Section 2(11) indicia.

The Employer asserts that dispatchers can hire, suspend, discharge, assign, and discipline employees, and can responsibly direct employees and adjust their grievances.¹² Alternatively, the Employer argues that dispatchers can effectively recommend all or some of these Section 2(11) indicia. First, I will discuss the evidence of the dispatchers' direct authority, then discuss the evidence of their authority to recommend effectively, and finally, their secondary indicia.

DIRECT AUTHORITY TO EXERCISE SECTION 2(11) INDICIA

The Employer contends that dispatchers have direct Section 2(11) authority to assign work to employees, responsibly direct employees, discipline employees, and/or to adjust employees' grievances.¹³

¹² Two different job description documents are in the record; I have relied on them to the extent that they are consistent with the weight of the evidence. *Connecticut Light & Power Co.* 121 NLRB 768, 770 (1958) (mere issuance of directives to alleged supervisors setting forth supervisory authority is not determinative of their supervisory status).

¹³ No evidence was adduced at the hearing, nor did the Employer argue, that dispatchers have direct authority to hire, suspend, and/or to discharge employees.

Assigning Work

On a weekly basis, dispatchers post driver schedules at each of the three facilities. The General Manager, Dispatch Manager and/or dispatchers create the driver schedules in accordance with several delimiting criteria: driver route assignments that are bid according to contractual seniority, approved leave requests,¹⁴ driver certifications, the drivers' collective bargaining agreement, Department of Transportation rules, State and Federal wage and hour laws, and an Employer policy to minimize overtime hours. In Bakersfield the General Manager or the Dispatch Manager fills out the drivers' weekly schedules. In Lake Isabella and Mojave, dispatchers fill out the schedules subject to the Dispatch Manager's and/or the General Manager's approval.¹⁵

After the schedule is posted, dispatchers may make changes in response to scheduled-drivers becoming unable to work, including "call-offs." When a scheduled-driver is unable to work, the dispatcher will document and report that driver's unavailability to either an on-duty manager, an on-call manager, or the Dispatch Manager, and will call drivers in an attempt to obtain voluntary coverage of the newly available route(s). If the dispatcher obtains voluntary coverage without management's assistance, the dispatcher changes the schedule and submits the change for management's approval. When the dispatcher is unable to obtain voluntary coverage, the dispatcher will call and obtain assistance from either an on-duty manager, an on-call manager or the Dispatch Manager, who alone have the authority to *assign* drivers to routes.

¹⁴ Leaves are approved by the General Manager.

Designating which employees will be scheduled to work pursuant to fixed guidelines created by management is insufficient to establish supervisory status, absent evidence that the employee uses independent judgment. *Armstrong Machine Company, Inc.* 343 NLRB, No. 122, Slip op. 4-8 (2004). Here, though dispatchers exercise some judgment in carrying out their duties to schedule employees and to call drivers for voluntary coverage, their discretion in scheduling drivers is considerably circumscribed by management guidelines, and does not amount to exercising independent judgment, as required by Section 2(11). See *Byers Engineering Corp.*, 324 NLRB 740, 740 (1997) (lead employee not supervisor when making routine and clerical reassignments and adjustments to employees' workloads based on changing working conditions).

The Employer contends that the dispatchers exercise independent judgment in approving driver time-off requests because, from time to time, drivers submit their time-off requests to dispatchers prior to submitting the request forms to the General Manager for approval.¹⁶ The evidence does establish that periodically, within the Employer's guidelines, dispatchers attempted to discuss time-off requests with drivers and to schedule drivers around time-off requests prior to the General Manager's approval. Nonetheless, this ministerial discussion with drivers does not go beyond the Employer's guidelines, and ultimately is subject to management's approval. I do not find that dispatchers' attempts to schedule time-off requests to be exercising a Section 2(11) indicia. *Brad Snodgrass, Inc.* 338 NLRB

¹⁵ The record establishes that Lake Isabella and Mojave dispatchers send these proposed schedules to management in Bakersfield for approval, and they so inform the drivers, even though changes to these schedules are rarely made by the Dispatch Manager.

¹⁶ The General Manager testified that she consistently approves dispatcher leave recommendations, so long as the routes are covered.

917, fn. 5 (2003) (foremen not supervisors when giving employees instruction within bounds of Employer guidelines).

Responsibly Directing Work

When drivers report to work, they receive from dispatchers: bus keys, a bus, route paperwork, and confirmation of their assignment. The dispatcher chooses which bus to assign to each driver based on each driver's certifications, size of the bus needed for the route, the maintenance schedule¹⁷ and whether the bus requires refueling. Throughout the day dispatchers communicate with drivers (in person, by phone and/or by radio) regarding the drivers' carrying out their daily assignments, including inspecting their buses, driving their routes, changes in the routes, fueling, cleaning and/or maintenance of their buses, and filling out paperwork associated with their buses and their routes. Dispatchers are responsible for monitoring and documenting the daily operations of the Employer's business as conducted through their dispatch office, which also includes communication with passengers. The evidence establishes that dispatchers spend at least half their working hours filling out paperwork to monitor and report the daily operations, and at least daily, they send written reports to the managers.

The dispatchers are responsible for monitoring and reporting that drivers report for work, that drivers receive and fill out the appropriate driving paperwork, that drivers inspect, fuel and/or clean their buses, that drivers follow appropriate timelines in reaching their pick-up and drop-off points, and that drivers do not

¹⁷ The Dispatch Manager has daily interaction with dispatchers: she creates handwritten instructions for them, assigns buses, informs them about priorities in bus usage based on cleaning and/or maintenance schedules.

break the Employer's rules – such as being out of uniform, being impaired by drug use, and/or speeding. If a driver is not dressed properly and/or appears impaired, the dispatcher is required to withhold the driver's keys and notify a manager.¹⁸ Also, in accordance with the Employer's policy, dispatchers are responsible for counting and verifying money,¹⁹ and on an hourly basis, dispatchers are required to communicate safety messages to drivers.²⁰

The exercise of authority by employees with greater job responsibilities to assign and direct other employees in assuring job quality does not, by itself, confer supervisory status. *Victoria Partners*, 327 NLRB 54, 61 (1998). Leadmen who direct employees in a routine manner and who are given the responsibility to direct work based upon higher skill and greater seniority are not supervisors within the meaning of the Act. *Somerset Welding & Steel*, 291 NLRB 913 (1988). Here, the evidence establishes that dispatchers direct drivers within the confines of the Employer's policies and the terms of the collective bargaining agreement covering the drivers. There is no evidence establishing that dispatchers exercise more than common sense judgment in giving direction to employees, or that dispatchers have authority to breach any Employer guideline without clearance from a manager.

¹⁸ The Employer has a dress-code policy and a 5 miles-per-hour speed limit in their yards. Dispatchers receive periodic training to assist them to identify impairment.

¹⁹ Some buses contain money vaults that are frequently emptied and the contents recorded. Because the Employer performs busing services for Kern County, Kern county agents are involved in counting money received. The record is unclear concerning the degree to which dispatchers are involved in transferring money vaults from buses to Kern county agents. In the past, Lake Isabella and Mojave dispatchers pulled vaults and counted the money, while Kern county agents count the money at Bakersfield. It appears that currently only Lake Isabella dispatchers retain this counting and verification duty.

The Employer points out that under certain circumstances allowed by the Employer, dispatchers have the authority to forbid drivers from driving, which has an impact on their wages. Similarly, the Employer points out that the dispatchers can give the drivers up to two hours of overtime.²¹ No instances, however, are in the record of a dispatcher stopping a driver from driving, and the record fails to establish the frequency with which dispatchers have even an opportunity to assign less than two hours of overtime to drivers. As noted, the record does establish that dispatchers are limited in their ability to request driver overtime by the Employer's scheduling criteria. Thus, even if there is some impact on terms and conditions of employment, absent evidence of exercising independent judgment in this context I cannot conclude that herein, dispatchers are demonstrating a Section 2 (11) supervisory indicium. *Greyhound Airport Services, Inc.* 189 NLRB 291, 292 (1971) (not supervisor even though dispatcher "knocked" driver off the clock for suspected drunkenness in accord with Employer policy). No evidence was adduced establishing any specific instance in which a dispatcher made a scheduling decision regarding overtime or exercised any discretion outside of the Employer's policy guidelines in denying and/or granting work to drivers. *Kentucky River*, supra at 709 (the burden of establishing supervisory status rests on the party asserting it); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999) ("any lack of evidence in the record is construed against the party asserting supervisory status").

²⁰ The Employer maintains a list of safety messages from which dispatchers are supposed to choose an appropriate safety message to communicate to drivers. The record is ambiguous concerning both how and if the dispatchers communicate the "hourly" safety messages to drivers.

²¹ If more than two hours of driver overtime is unavoidable, then, in addition to following the previously described Employer scheduling guidelines, dispatchers are required to schedule according to a seniority list of volunteer drivers.

Disciplining Employees And Adjusting Their Grievances

The Employer argues that because dispatchers are authorized to “counsel”²² drivers, they can therefore discipline and/or adjust their grievances.

The record establishes that dispatchers are responsible for documenting and/or orally communicating to either an on-duty manager, an on-call manager or to the Dispatch Manager daily occurrences that take place during their work-shift. Depending on the kind of occurrence, dispatchers will report to management in writing by filling out and submitting daily dispatcher’s report forms, customer complaint forms and/or unusual incident report forms.²³

The Employer argues that the dispatchers’ documentation of occurrences demonstrates the dispatchers’ authority to discipline drivers and/or adjust their grievances, noting dispatcher counseling of drivers regarding customer complaints, absences, altercations with other employees, passenger problems, speeding, and being out of uniform. The record does not establish that any of these counseling activities resulted in discipline or had an impact on any driver’s status or tenure with the Company. *Williamette Industries*, 336 NLRB 743, 743-744 (2001) (a lead person’s documentation to report employee conduct and/or performance does not

²² Herein, I continue to use the word counsel to refer to various dispatcher discussions with drivers as they were raised in the record. As described below, I do not find that dispatchers possess authority to “counsel” drivers within the meaning of Section 2(11).

²³ The Employer provided eight examples of daily dispatcher reports, one example of an incident report and two examples of customer service forms. The Union provided two Employee Consultation Reports, which describe the level of discipline being imposed. The Employer admits that dispatchers do not have the authority to handle Employee Consultation Reports and/or driver problems at the level of Union grievances; those may only be handled by one of the managers, and in accordance with the collective bargaining agreement, copies must be sent to the Union. I note that Union grievances by their very definition concern wages, hours and other terms and conditions of employment, and if dispatchers are not authorized to handle them, they are not involved in the adjustment of grievances within the meaning of Section 2(11).

rise to the level of supervisory indicia if the evaluation does not affect employee status or tenure).²⁴

Each of the alleged counseling activities was routine, clerical, or within the policies of the Employer, and therefore did not establish the existence of independent judgment. Giving instructions or minor orders to other employees within the confines of Employer guidelines does not confer supervisory status on employees. *Franklin Home Health Agency*, 337 NLRB 836, 829 (2002). Here, the dispatchers' enforcement of the Employer's uniform policy and no speeding policy serve as minor orders and/or instruction given to drivers.

Reporting and documenting employee non-compliance with Employer policy is merely a reporting function that does not establish supervisory status when management makes its own investigation as to what should be done. *Express Messenger Systems*, 301 NLRB 651, 653-654 (1991). Here, any dispatcher counseling of drivers regarding customer complaints, altercations and passenger problems is not a supervisory indicium because it is mere documenting and reporting driver conduct.²⁵

Mere service as an intermediary to relay information from management to employees does not convert the dispatcher into a supervisor. *Carlisle Engineered Products, Inc.* 330 NLRB 1359, 1360 (2000). See also, *Passavant Health Center*,

²⁴ The Employer's handbook may state that the dispatcher has authority to discipline employees for rule infractions. The handbook, however, is not in the record. Further, even if it were in evidence, it would not be dispositive regarding whether dispatchers have authority to discipline drivers. *Connecticut Light & Power Co.* Supra 770.

²⁵ The Employer asserts that the dispatcher's authority becomes disciplinary because the documents are placed in a driver's personnel file, and anything in the personnel file is grievable – therefore it is disciplinary. The evidence does not establish that the dispatchers' documentation disciplinary in and of itself. There is no evidence that the Employer relied on dispatchers' documentation of incidents without conducting its own managerial investigation.

284 NLRB 887, 889 (1987) (lead employee serving as conduit for management to communicate with employees does not create a supervisor). Here, the dispatchers' informing drivers of the Employer's policies is part of their circumscribed job duties.

When drivers "call off" sick or report late, dispatchers are required to report their absence by filling out a "Summary of Absenteeism" form ("blue slip") that includes a space for assessing penalty points. In assessing the penalty points, dispatchers should consult the Employer's guidelines to determine penalty points based on the type of absence.²⁶ After the dispatcher submits the blue slip to the Dispatch Manager, the Dispatch Manager reviews the driver's absence records to determine the number of points to assess. The Dispatch Manager returns the penalty assessment form to the dispatcher who gives it to the driver for signature.²⁷ The dispatcher then forwards the signed form to the Dispatch Manager, who in turn forwards the form to the Union.²⁸ There is no evidence that the dispatcher exercises any discretion in determining whether or the degree to which drivers are disciplined for their absences.

I find that the dispatchers' limited authority regarding disciplining employees and/or adjusting their grievances does not establish their Section 2(11) status. Their discretion in deciding whether something is minor or major, which would

²⁶ The record contains no evidence that any dispatcher in fact has assessed penalty points to a driver. In both "blue slips" in the record, the dispatcher who filled out the form left the penalty points space blank.

²⁷ This document was described on the record but not provided.

²⁸ Pursuant to the collective bargaining agreement, the Employer is required to submit to the Union "all [driver] disciplinary notices and/or attendance write ups."

then affect their decision whether to counsel, enforce an Employer policy, involve management and/or reduce incidents to writing is no more than minor, common-sense decision-making; it does not rise to the level of supervisory discretion.

Franklin Home Health Agency, 337 NLRB 836, 829 (2002).

As more fully described above, I find that dispatchers do not have direct Section 2(11) authority to assign work to employees, responsibly direct employees, discipline employees and/or adjust employees' grievances; rather, dispatchers merely exercise ordinary, clerical and/or routine judgment (not independent judgment) in carrying out the Employer's policies within a set of Employer guidelines.

EFFECTIVE RECOMMENDATION

The Employer contends that dispatchers have the authority to effectively recommend hiring, suspending, discharging, and/or disciplining of employees and/or adjusting of employees' grievances, noting seven specific instances²⁹ where dispatchers have made recommendations to the Employer regarding the employment or conduct of drivers.

In each of these instances, however, the record establishes either that no further action was taken, no further action was deemed to be necessary, or that the managers conducted an independent investigation. There is no record evidence that

²⁹ The Employer characterized daily and minor communications between managers and dispatchers as dispatcher recommendations, and on the record, the most specific instances of recommendations involved dispatcher communications with management regarding altercations between drivers, dispatcher sexual harassment allegations, driver "insubordination," driver applicants for hire and driver discharge. Mere suggestions do not make an individual a supervisor. *Brown & Root, Inc.*, 314 NLRB 19(1994). See also, *Necedah Screw Machine Products*, 323 NLRB 574 (1997) (signatures on forms used for disciplinary purposes do not rise to the level of effective recommendation under Section 2(11)).

management took hiring or disciplinary action that had any effect on driver status or tenure based exclusively upon a dispatcher's recommendation.

The authority effectively to recommend generally means that the recommended action is taken with no independent investigation by higher supervisors, not simply that the recommendation is ultimately followed. *Hawaiian Telephone Co.*, 186 NLRB 1, 1-2 (1970). See also, *ITT Lighting Fixtures* 265 NLRB 1480, 1481 (1982), reversed on other grounds 283 NLRB 453 (1987).

A recommendation is "effective" if it is followed without further review. *Mountaineer Park, Inc.* 343 NLRB No. 135 slip op 5-6 (2004). Here, the record establishes no pattern or practice by the Employer of "effectively" following dispatchers' recommendations: not only is there a little record evidence regarding dispatchers giving recommendations, there no evidence that any dispatcher's recommendation was effective within the meaning of the act.³⁰

Although both dispatchers and drivers are authorized to report rule infractions to management, this is insufficient to confer supervisory status because it does not lead to personnel action without review by others.³¹ *Artcraft Displays, Inc.* 262 NLRB 1233, 1234-1235 (1982) (leadmen not supervisors even though they report employee problems to employer); *Knogo Corp.* 265 NLRB 935, 935-936 (1982), enf. in relevant part 727 F.2d 55 (2d Cir. 1984) (leadperson not agent of employer although she reported rule infractions or repeated incidents of poor

³⁰ In the absence of evidence that such recommendations automatically lead to any further discipline or adverse action against an employee, supervisory status is not established. *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993); *Passavant Health Center*, 284 NLRB 887, 889 (1987); *The Ohio Masonic Home*, 295 NLRB 390, 393 (1989).

³¹ The record disclosed that one driver was discovered to be impaired when *another driver* reported the impairment.

performance by other employees where discipline was preceded by an independent investigation).

SECONDARY INDICIA

Non-statutory indicia may be used as background evidence to bolster an argument for the existence of supervisory status but is not dispositive absent evidence supporting the existence of one of the statutory indications of supervisory status. *Training School of Vineland*, 332 NLRB 1412 (2000). Here, because the record does not establish the existence of any one of the primary indicia of supervisory status, no secondary indicia can be dispositive.

The mere description or characterization of a lead employee as responsible for the direction of other employees, or as a supervisor, in and of itself, does not establish supervisory status. *Bowne of Houston, Inc.*, 280 NLRB 1222, 1225 (1986). The record establishes that in Lake Isabella and Mojave, most of the time, dispatchers are the highest-ranking persons present. Nonetheless, managers are always available. The fact that dispatchers are present in the facility when managers are not does not establish Section 2(11) supervisory status. *North Shore Weeklies, Inc.*, 317 NLRB 1128, 1131 (1995).

The record establishes that new drivers will generally receive more extensive guidance from dispatchers than the more experienced drivers. Though testimony was given to establish that dispatchers guide new drivers, no evidence was adduced to establish that dispatchers are responsible for exercising independent judgment in training drivers. This factor is therefore insufficient to establish Section 2(11) supervisory status since a lead employee's monitoring of the quality of new employees' performance, training them how to perform tasks, and instructing them

to redo tasks does not support a finding of supervisory status. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994).

In looking at the ratio of supervisors to employees, the Board may consider whether the finding would create an unrealistic ratio based on a practical evaluation of employee functions in the context of the organization. In this case, all four managers play some role in supervising dispatchers and drivers, and having four supervisors for 56-66 employees is not unrealistic based on the nature of the operations as established by the record.³²

I find, therefore, that these secondary indicia do not militate against finding dispatchers to be employees.

C. CONCLUSION

The Board will not construe supervisory status too broadly because “[an] employee who is deemed a supervisor loses his protected right to organize, a right Congress intended to protect by the Act.” *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). The party attempting to exclude based on supervisory status has the burden of establishing that the individual is a supervisor within the meaning of Section 2(11) of the Act. *Kentucky River* supra; *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Here, the Employer has not met its burden to establish that dispatchers are supervisors within the meaning of Section 2(11) of the Act.

In light of the foregoing, I conclude that dispatchers are not Section 2(11) supervisors and therefore may constitute an appropriate bargaining unit.

³² The record establishes that although dispatchers receive annual written appraisals, and the drivers do not. The drivers are periodically appraised through “ride-alongs,” and the record is silent concerning who performs the “ride-alongs.” Further, the record is silent regarding the number of drivers who are full-time and the number of drivers who are part-time. See *Elmhurst Extended Care Facilities*, supra at 536 fn. 8 (1999) (“any lack of evidence in the record is construed against the party asserting supervisory status”).

There are approximately 8 employees in the bargaining unit.

DIRECTION OF ELECTION³³

I shall conduct an election by secret ballot among the employees in the unit found appropriate at the time, place and manner set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations.

ELIGIBLE TO VOTE: Those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, are eligible to vote. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States Government may vote if they appear in person at the polls.

INELIGIBLE TO VOTE: Employees who have quit or have been discharged for cause after the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees

³³ In accordance with Section 102.67 of the Board's Rules and Regulations as amended, all parties are specifically advised that I will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

engaged in an economic strike that commenced more than 12 months before the election date and who have been permanently replaced, are ineligible to vote.

Those eligible shall vote whether they desire to be represented for collective bargaining purposes by **Teamsters, Local 87, AFL-CIO, General Teamsters and Food Processing.**

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employer with me within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before July 1, 2005. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary

checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

RIGHT TO REQUEST REVIEW

A request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570, under the provision of Section 102.67 of the Board's Rules and Regulations. This request must be received by the Board in Washington by July 8, 2005.³⁴

DATED at Los Angeles, California this 24th day of June, 2005.

/s/ Byron B. Kohn
Byron B. Kohn, Acting Regional Director
National Labor Relations Board
Region 31

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In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.